

SUBCHAPTER A—ORGANIZATION AND OPERATIONS

PART 1202—FREEDOM OF INFORMATION ACT

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SOURCE: 74 FR 2342, Jan. 15, 2009, unless otherwise noted.

§ 1202.1 Why did FHFA issue this part?

(a) The Freedom of Information Act (FOIA) (5 U.S.C. 552), is a federal law that requires the Federal Housing Finance Agency (FHFA) and other government agencies to disclose records to the public.

(b) This part explains the rules that FHFA follows when processing and responding to requests for records under the FOIA. It also explains what you must do to request records from FHFA under the FOIA. You should read this part together with the FOIA, which explains in more detail your rights and the records FHFA may release to you.

(c) If you want to request information about yourself under the Privacy Act (5 U.S.C. 552a), you should file your request using FHFA's Privacy Act regulations at part 1204 of this Title. If you file a FOIA request for information about yourself, FHFA will process it as

a request under the separate Privacy Act rules.

(d) FHFA may make public information that it routinely publishes or discloses when performing its activities without following these procedures.

§ 1202.2 What do the terms in this part mean?

Some of the terms you need to understand while reading the regulations in this part are—

Appeals Officer or *FOIA Appeals Officer* means a person designated by the Director of the Federal Housing Finance Agency (FHFA) to process appeals of denials of requests for FHFA records under the FOIA.

Confidential commercial information means records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

Days, unless stated as “calendar days,” are working days and do not include Saturdays, Sundays, and federal holidays. If the last day of any period prescribed herein falls on a Saturday, Sunday, or federal holiday, the last day of the period will be the next working day that is not a Saturday, Sunday, or federal holiday.

Direct costs means the expenses, including for contract services, incurred by FHFA in search time, or reviewing and duplicating records to respond to a request for information. In the case of a commercial use request, the term also means those expenditures FHFA actually incurs in reviewing records to respond to the request. Direct costs include the cost of the time of the employee performing the work, the cost of any computer searches, and the cost of operating duplication equipment. Direct costs do not include overhead expenses such as costs of space, and heating or lighting the facility in which the records are stored.

Employee, for the purposes of this part, means any person holding an appointment to a position of employment

with FHFA or any person who formerly held such an appointment; any conservator appointed by FHFA; or any agent or independent contractor acting on behalf of FHFA, even though the appointment or contract has terminated.

FHFA means the Federal Housing Finance Agency and includes its predecessor agencies, the Office of Federal Housing Enterprise Oversight (OFHEO) and, the Federal Housing Finance Board (FHFB). FHFA is an agency responsible for the regulation or supervision of financial institutions.

FOIA Officer and *Chief FOIA Officer* are persons designated by the Director of FHFA to process and respond to requests for FHFA records under the FOIA. The mailing address for the FOIA Officer or the Chief FOIA Officer is FHFA, 1700 G Street, NW., Washington, DC 20552.

Readily reproducible means that the requested record or records exist in electronic format and can be downloaded or transferred intact to a computer disk, tape, or other electronic medium with equipment and software currently in use by FHFA.

Record means information or documentary material FHFA maintains in any form or format, including electronic, which FHFA—

(1) Created or received under federal law or in connection with the transaction of public business;

(2) Preserved or determined is appropriate for preservation as evidence of FHFA's operations or activities or because of the value of the information it contains; and

(3) Controls at the time it receives a request for disclosure.

Regulated entities means the Federal Home Loan Mortgage Corporation ("Freddie Mac"), the Federal National Mortgage Association ("Fannie Mae"), any Federal Home Loan Bank and/or any affiliate thereof that is subject to the regulatory authority of FHFA.

Requester means any person seeking access to FHFA records under the FOIA.

Search time means the amount of time spent by or on behalf of FHFA in attempting to locate records responsive to a request, manually, or by electronic means, including page-by-page or line-by-line identification of respon-

sive material within a record or extraction of electronic information from electronic storage media.

Submitter means any person or entity providing confidential information to the government. The term submitter includes, but is not limited to corporations, state governments, and foreign governments.

Unusual circumstances means the need to—

(1) Search for and collect records from agencies, offices, facilities, or locations that are separate from the office processing the request;

(2) Search, review, and duplicate a voluminous amount of separate and distinct records in order to process a single request; or

(3) Consult with another agency or among two or more components of FHFA that have a substantial interest in the determination of a request.

§ 1202.3 What information can I obtain through FOIA?

(a) *General.* FHFA generally follows a policy prohibiting employees from releasing or disclosing confidential or otherwise non-public information that FHFA possesses, except as authorized by this part or by the Director of FHFA, when the disclosure is necessary for the performance of official duties

(b) *Records.* You may request that FHFA disclose to you its records on a subject of interest to you. The FOIA only requires the disclosure of records. It does not require FHFA to create compilations of information or to provide narrative responses to questions or queries. Some information is exempt from disclosure.

(c) *Reading rooms.* (1) FHFA maintains electronic and physical reading rooms. The physical reading room is located at 1700 G Street, NW., Fourth Floor, Washington, DC 20552, and is open to the public by appointment from 9 a.m. to 3 p.m. each business day. For an appointment, contact the FOIA Officer by calling 202-414-6425 or by e-mail at foia@fhfa.gov. The electronic reading room is part of the FHFA Web site at <http://www.fhfa.gov>.

(2) Each reading room has the following records created by FHFA or its predecessor agencies after November 1,

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1996, and current indices to all of the following records created by FHFA or its predecessor agencies before or after November 1, 1996:

- (i) Final opinions or orders issued in adjudication;
- (ii) Statements of policy and interpretation that are not published in the FEDERAL REGISTER;
- (iii) Administrative staff manuals and instructions to staff that affect a member of the public, and are not exempt from disclosure under FOIA; and
- (iv) Copies of records released under FOIA that FHFA determines have become or are likely to become the subject of subsequent requests for substantially the same records.

[74 FR 2342, Jan. 15, 2009, as amended at 74 FR 18624, Apr. 24, 2009]

§ 1202.4 What information is exempt from disclosure?

(a) *General.* Unless the Director of FHFA, his or her designee, any FHFA regulation, or a statute specifically authorizes disclosure, FHFA will not release records of matters that are—

(1) Specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy, and is in fact properly classified pursuant to such Executive order.

(2) Related solely to FHFA's internal personnel rules and practices.

(3) Specifically exempted from disclosure by statute (other than 5 U.S.C. 552b), provided that such statute—

(i) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or

(ii) Establishes particular criteria for withholding or refers to particular types of matters to be withheld.

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential.

(5) Contained in inter-agency or intra-agency memoranda or letters that would not be available by law to a private party in litigation with FHFA.

(6) Contained in personnel, medical or similar files (including financial files) the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(7) Compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information—

(i) Could reasonably be expected to interfere with enforcement proceedings;

(ii) Would deprive a person of a right to fair trial or an impartial adjudication;

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution or an entity that is regulated and examined by FHFA that furnished information on a confidential basis, and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual.

(8) Contained in or related to examination, operating, or condition reports that are prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.

(9) Geological and geophysical information and data, including maps, concerning wells.

(b) *Discretion To Apply Exemptions.* Although records or parts of them may be exempt from disclosure, FHFA may elect under the circumstances of any particular request not to apply an exemption. This election does not generally waive the exemption and it does not have precedential effect. FHFA may still apply the exemption to any other records or portions of records, regardless of when the request is received.

(c) *Redacted Portion.* If a requested record contains exempt information and information that can be disclosed and the portions can reasonably be segregated from each other, the portion of the record that can be disclosed will be released to the requester after FHFA deletes the exempt portions. If it is technically feasible, FHFA will indicate the amount of the information deleted at the place in the record where the deletion is made and include a notation identifying the exemption that was applied, unless including that indication would harm an interest protected by an exemption.

(d) *Exempt and Redacted Material.* FHFA is not required to provide an itemized index correlating each withheld document (or redacted portion) with a specific exemption justification.

(e) *Disclosure to Congress.* This section does not allow FHFA to withhold any information from, or to prohibit the disclosure of any information to, the Congress or any congressional committee or subcommittee.

§ 1202.5 How do I request information from FHFA under FOIA?

(a) *Where To Send Your Request.* FOIA requests must be in writing. You may make a request for FHFA records by writing directly to the FOIA Office through electronic mail, regular mail, or fax. The electronic mail address is: foia@fhfa.gov. The regular mail address is: FOIA Officer, Federal Housing Finance Agency, 1700 G Street, NW., Washington, DC 20552. The fax number is: (202) 414-8917. You can help FHFA process your request by marking electronic mail, letter, or fax and the subject line, envelope, or fax cover sheet “FOIA Request.” You may find the FHFA’s “Freedom of Information Act Reference Guides,” available electronically on the FHFA’s Web site, <http://www.fhfa.gov>, helpful in making your request.

(b) *Provide Your Name and Address.* Your request must include your full name, your address and, if different, the address at which FHFA is to notify you about your request; a telephone number at which you can be reached during normal business hours, and an electronic mail address, if any.

(c) *Request Is Under FOIA.* Your request must have a statement identifying it as being made under FOIA.

(d) *Your FOIA Status.* If you are submitting your request as a “commercial use” requester, an “educational institution” requester, a “non-commercial scientific institution” requester, or a “representative of the news media” for the purposes of the fee provisions of FOIA, your request must include a statement specifically identifying your status.

(e) *Describing the Records You Request.* You must describe the records that you seek in enough detail to enable FHFA personnel to locate them with a reasonable amount of effort. Your request should include as much specific information as possible that you know about each record you request, such as the date, title or name, author, recipient, subject matter, and file designations or descriptions of the record.

(f) *How You Want the Records Produced to You.* Your request must tell FHFA whether you will inspect the records before duplication or want them duplicated and furnished without inspection.

(g) *Agreement To Pay Fees.* Your FOIA request is an agreement by you to pay all applicable fees charged under section 1202.11, up to \$100.00, unless you seek a fee waiver. When making a request, you may specify a higher or lower amount you will pay without consultation. Your inability to pay a fee does not justify granting a fee waiver.

(h) *Valid Requests.* FHFA will only process valid requests. A valid request must meet all the requirements of this section.

§ 1202.6 What if my request does not have all the information FHFA requires?

If the FHFA determines that your request does not reasonably describe the records you seek, is overly broad, or otherwise lacks required information, we will inform you in writing to explain why your request is incomplete or insufficient and give you 30 calendar days to modify your request to meet all the requirements. The first request for additional information tolls the 20

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days period for FHFA to respond to your request under §1202.7.

(a) If you respond with an amended request, FHFA will process the amended request as a new request.

(b) If you do not respond or provide additional information within the time allowed, or if the additional information you provide is still incomplete or insufficient, FHFA will consider the request withdrawn.

(c) If the additional information you are required to provide concerns fees that may be incurred or an agreement to pay fees, FHFA may toll the 20 days response time under section 1202.7, as often as necessary to obtain the additional information.

§ 1202.7 How will FHFA respond to my FOIA request?

(a) *Authority to Grant or Deny Requests.* The FOIA Officer and the Chief FOIA Officer are authorized to grant or deny any request for FHFA records.

(b) *Multi-Track Request Processing.* FHFA uses a multi-track system to process FOIA requests. This means that FOIA requests are processed based on their complexity. When FHFA receives your request, it is assigned to a Standard Track or Complex Track. FHFA will notify you if your request is assigned to the Complex Track as described in paragraph (e) of this section for extensions of time.

(1) *Standard Track.* FHFA assigns FOIA requests that are routine and require little or no search time, review, or analysis to the Standard Track. We respond to these requests within 20 days after receipt, in the order in which they are received. If FHFA determines while processing your Standard Track request, that it is more appropriately a Complex Track request, we will reassign it to the Complex Track and notify you as described in paragraph (e) of this section for extensions of time.

(2) *Complex Track.* FHFA assigns requests that are not routine to the Complex Track. Complex Track requests are those to which FHFA determines that that response will be voluminous, involve two or more FHFA units, require consultation with other agencies or entities, require searches of archived documents; or when FHFA determines

that the request seeks confidential commercial information as described in section 1202.8, or will require an unusually high level of effort to search for, review and or duplicate records, or will cause undue disruption to the day-to-day activities of FHFA regulating and supervising the regulated entities. FHFA will respond to Complex Track requests as soon as reasonably possible, regardless of the date of receipt.

(c) *Referrals to Other Agencies.* When FHFA receives a request seeking records that originated in another Federal Government agency, FHFA refers the request to the other agency for response. FHFA will notify you if your request is referred to another agency.

(d) *Responses to FOIA Requests.* FHFA will respond to your request by granting or denying it in full, or by granting and denying it in parts. FHFA's response will be in writing. In determining which records are responsive to your request, we ordinarily will include only records we possess as of the date the request.

(1) *Requests That FHFA Grants.* If FHFA grants your request in full, the response will include the requested records or details about how FHFA will provide them to you, and the amount of any fees charged.

(2) *Requests That FHFA Denies or Grants and Denies in Parts.* If FHFA denies your request in full or grants and denies separate parts of it, the response will be signed by the official responding. If we deny your request in whole or in part because a requested record does not exist or cannot be located, is not readily reproducible in the form or format you sought, is not subject to the FOIA, or is exempt from disclosure, the written response will include the requested records, if any, the amount of any fees charged, the reasons for any denial, and a notice and description of your right to file an administrative appeal under section 1202.9.

(e) *Format and Delivery of Disclosed Records.* If FHFA grants, in whole or in part, your request for disclosure of records under FOIA, we will make the records available to you in the form or format you requested, if it is readily reproducible in that form or format. We will send them to the address you provided by regular U.S. Mail or by

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electronic mail unless we agree with you on alternate arrangements, such as your agreement to pay express or expedited delivery service fees or to pick up records at our office.

(f) *Extensions of Time.* In unusual circumstances, FHFA may extend the time limit in paragraph (b) of this section for no more than ten (10) days and notify you of—

- (1) The reason for the extension;
- (2) The date on which the determination in accordance with paragraph (b) of this section is expected; and
- (3) The opportunity to limit the scope of the request so that the FHFA may process it on the simple track, or arrange an alternative time period for processing the request or a modified request.

§ 1202.8 If the records I request contain confidential commercial information, what procedures will FHFA follow?

(a) *General.* FHFA will not disclose confidential commercial information in response to your FOIA request except as described in this section.

(b) *Designation of Confidential Commercial Information.* Submitters of commercial information should use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, those portions of the information they deem to be protected under 5 U.S.C. 552(b)(4) and section 1202.4(a)(4). Any such designation expired ten (10) years after they were submitted to the Government, unless the submitter requests, and provides reasonable justification for, a designation period of longer duration.

(c) *Predisclosure Notification.* Except as provided in paragraph (e) of this section, if your FOIA request encompasses confidential commercial information, FHFA will, prior to disclosure of the information and to the extent permitted by law, provide prompt written notice to a submitter that confidential commercial information was requested when—

- (1) The submitter has in good faith designated the information as confidential commercial information protected from disclosure under 5 U.S.C. 552(b)(4) and section 1202.4(a)(4); or

- (2) FHFA has reason to believe that the request seeks confidential commercial information, the disclosure of which may result in substantial competitive harm to the submitter.

(d) *Content of Predisclosure Notification.* When FHFA sends a predisclosure notification to a submitter, it will contain—

- (1) A description of the exact nature of the confidential commercial information requested or copies of the records or portions thereof containing the confidential business information; and

- (2) An opportunity to object to disclosure within ten (10) days by providing to FHFA a detailed written statement demonstrating all reasons the submitter opposes disclosure.

(e) *Exceptions to Predisclosure Notification.* FHFA is not required to send a predisclosure notification if—

- (1) FHFA determines that information should not be disclosed;

- (2) The information lawfully has been published or has been officially made available to the public;

- (3) Disclosure of the information is required by law, other than the FOIA;

- (4) The information requested is not designated by the submitter as confidential commercial information pursuant to this section; or

- (5) The designation made by the submitter, under paragraph (b) of this section, appears obviously frivolous; except that, FHFA will provide the submitter with written notice of any final decision to disclose the designated confidential commercial information within a reasonable number of days prior to a specified disclosure date.

(f) *Submitter's Objection to Disclosure.* A submitter may object to disclosure within ten (10) days after date of the Predisclosure Notification, or such other time period that FHFA may allow, by delivering to FHFA a statement demonstrating all grounds on which it opposes disclosure, and all reasons supporting its contention that the information should not be disclosed. The submitter's objection must contain a certification by the submitter, or an officer or authorized representative of the submitter, that the grounds and reasons presented are true

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and correct to the best of the submitter's knowledge. The submitter's objection may itself be subject to disclosure under the FOIA.

(g) *Notice of Intent to Disclose Information.* FHFA will consider carefully all grounds and reasons provided by a submitter objecting to disclosure. If FHFA decides to disclose confidential commercial information over the objection of the submitter, it will provide to the submitter, at least ten (10) days before the date of disclosure, written notice containing—

(1) A statement of the reasons for not sustaining the submitter's objections to disclosure;

(2) A description of the confidential commercial information to be disclosed; and

(3) A specified disclosure date.

(h) *Notice to Requester.* FHFA will give a requester whose request encompasses confidential commercial information the following notices—

(1) At the time a Predisclosure Notification is provided to the submitter, written notice that the request encompasses confidential commercial information that may be exempt from disclosure under 5 U.S.C. 552(b)(4) and section 1202.4(a)(4) and that the submitter of the information has been given the opportunity to comment on the proposed disclosure of the information; and

(2) At the time a Notice of Intent to Disclose is provided to the submitter, a copy of the Notice of Intent to Disclose, at least days before the specified disclosure date.

(i) *Notice of FOIA Lawsuit.* FHFA will promptly notify the submitter whenever a requester files suit seeking to compel disclosure of the submitter's confidential commercial information.

§ 1202.9 How do I Appeal a Response Denying my FOIA Request?

(a) *Right of Appeal.* If FHFA denied your request in whole or in part, you may appeal the denial to: FOIA Appeals Officer, Federal Housing Finance Agency, 1700 G Street, NW., Washington DC 20552. If you use a mail, express, or courier delivery service to file your appeal, include a clear marking identifying it as a "FOIA APPEAL." You may file your appeal electroni-

cally by sending it to: foia@fhfa.gov with "FOIA Appeal" in the subject line. You may file an appeal by facsimile addressed to the attention of the FOIA Appeals Officer at (202) 414-6504, clearly identifying on the cover sheet that it is a "FOIA Appeal."

(b) *Timing, Form, Content and Receipt of an Appeal.* Your appeal must be written and submitted within 30 calendar days after you received FHFA's response denying your request. Your appeal must include a copy of the initial request, a copy of the letter denying the request in whole or in part, and a statement of the circumstances, reasons, or arguments you believe support disclosure of the requested record. FHFA will not consider an improperly addressed appeal to have been received for the purposes of the 20 days time period of paragraph (d) of this section, until it is actually received by the Appeals Officer, or would have been received by the Appeals Officer if due diligence were exercised.

(c) *Extensions of Time To Appeal.* If you need more time to file your appeal, you may request an extension of time of no more than ten (10) days in which to file your appeal, but only if your request is made within the original 30 calendar days time period for filing the appeal. The FOIA Appeals Officer has discretion to grant extensions of time to file appeals.

(d) *Final Action on Appeal.* FHFA's determination on your appeal will be in writing, signed by the FOIA Appeals Officer, and mailed within 20 days after the appeal is received or by the last day of the last extension under paragraph (e) of this section. The determination of an appeal is the final action of FHFA on a FOIA request. A determination—

(1) Affirming in whole or in part the denial of a request and including a brief statement of the reason or reasons for affirmance, including each FOIA exemption relied on.

(2) Reversing the denial of a request in whole or in part, requiring the request to be processed promptly in accordance with the determination.

(3) Remanding a request to the FOIA Officer for re-processing, stating the time limits for responding to the remanded request.

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(e) *Notice of Delayed Determinations on Appeal.* If FHFA cannot mail a determination on your appeal within the time limit, the Appeals Officer will continue to process the appeal and upon expiration of the time limit, will inform you the reason for the delay and the date on which a determination may be expected to be mailed. In this notice of delay, the FOIA Appeals Officer may request that you forebear seeking judicial review until a final determination of the appeal.

(f) *Judicial Review.* If the denial of your request for records is upheld in whole or in part, or if a determination on the appeal has not been mailed at the end of the 20 days period in paragraph (d) of this section, or the last extension thereof, you may seek judicial review under 5 U.S.C. 552(a)(4).

§ 1202.10 Will FHFA expedite my request or appeal?

(a) *Applications for Expedited Processing.* You may apply for expedited processing of an initial request or of an appeal. Your application must be in writing. FHFA will grant expedited processing, and give the request or appeal priority if your application demonstrates a compelling need for expedited processing by showing—

(1) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(2) An urgency to inform the public about an actual or alleged Federal government activity if you are a person primarily engaged in disseminating information;

(3) The loss of substantial due process or rights;

(4) A matter of widespread and exceptional media interest in which there exists possible questions about the government's integrity, affecting public confidence; or

(5) Humanitarian need.

(b) *Certification of Compelling Need.* Your application for expedited processing must include a statement certifying that the reasons you present to demonstrate a compelling need are true and correct to the best of your knowledge.

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(c) *Determination on Application.* FHFA will notify you within ten (10) days of receipt of your application whether expedited processing has been granted. If your application is denied, you may appeal under section 1202.9.

§ 1202.11 What will it cost to get the records I requested?

(a) *Assessment of Fees, Generally.* FHFA will assess you for fees covering the direct costs of responding to your request and costs for duplicating records, except as otherwise provided in a statute with respect to the determination of fees that may be assessed for disclosure, search time, or review of particular records.

(b) *Assessment of Fees, Categories of Requesters.* The fees that FHFA may assess vary depending on the type of request or the type of requester you are—

(1) *Commercial Use.* If you request records for a commercial use, the fees that FHFA may assess are limited to FHFA's operating costs incurred in search time, and/or to review and duplicate records.

(2) *Educational Institution, Non-commercial Scientific Institution, Representative of the News Media.* If you are not requesting records for commercial use and you are an educational institution, a noncommercial scientific institution or a representative of the news media, the fees that FHFA may assess are limited to FHFA's costs incurred for duplication in excess of 100 pages, or an electronic equivalent of 100 pages.

(3) *Other.* If neither paragraph (b)(1) nor paragraph (b)(2) of this section applies, the fees FHFA may assess you are limited to the costs FHFA incurs in search time and review in excess of two hours and to duplicate in excess of 100 pages, or an electronic equivalent of 100 pages.

(c) *Fee Schedule.* FHFA will maintain a current schedule of fees on its Web site at: <http://www.fhfa.gov>.

(d) *Notice of Anticipated Fees in Excess of \$100.00.* When FHFA determines or estimates that the fees chargeable to you will exceed \$100.00, FHFA will notify you of the actual or estimated amount of fees you will incur, unless you earlier indicated your willingness

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to pay fees as high as those anticipated. When you are notified that the actual or estimated fees exceed \$100.00, your FOIA request will not be considered received by FHFA until you agree to pay the anticipated total fee.

(e) *Advance Payment of Fees.* FHFA may request that you pay estimated fees or a deposit in advance of responding to your request. If FHFA requests advance payment or a deposit, your request will not be considered received by FHFA until the advance payment or deposit is received. FHFA will request advance payment or a deposit only if—

(1) The fees are likely to exceed \$500.00. If it appears that the fees will exceed \$500.00, FHFA will notify you of the likely cost and obtain satisfactory assurance of full payment if you have a history of prompt payment of FOIA fees to FHFA. If you do not have a history of payment, or if the estimate of fees exceeds \$1,000.00, FHFA may require an advance payment of fees in an amount up to the full estimated charge that will be incurred; or

(2) You previously failed to pay a fee to FHFA in a timely fashion, *i.e.*, within 30 calendar days of the date of a billing. FHFA may require you to make advance payment of the full amount of the fees anticipated before processing a new request or finishing processing of a pending request. If you have an outstanding balance due from a prior request, FHFA may require you to pay the full amount owed plus any applicable interest, as provided in paragraph (f) of this section, or demonstrate that the fee owed has been paid, as well as payment of the full amount of anticipated fees before processing your request.

(f) *Interest.* FHFA may charge you interest on an unpaid bill starting on the 31st calendar day following the day on which the bill was sent. Once a fee payment has been received by FHFA, even if not processed, FHFA will stay the accrual of interest. Interest charges shall be assessed at the rate prescribed by 31 U.S.C. 3717 and shall accrue from the date of the billing.

(g) *FHFA Assistance To Reduce Costs.* If FHFA notifies you of estimated fees exceeding \$100.00 or requests advance payment or a deposit, you will have an opportunity to consult with FHFA

staff to modify or reformulate your request to meet your needs at a lower cost.

§ 1202.12 Is there anything else I need to know about FOIA procedures?

These FOIA regulations in this part do not and shall not be construed to create any right or to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under FOIA. This part only provides procedures for requesting records under FOIA.

PART 1203—EQUAL ACCESS TO JUSTICE ACT

Subpart A—General Provisions

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AUTHORITY: 12 U.S.C. 4526, 5 U.S.C. 504.

SOURCE: 75 FR 65219, Oct. 22, 2010, unless otherwise noted..

Subpart A—General Provisions

§ 1203.1 Purpose and scope.

(a) This part implements the Equal Access to Justice Act, 5 U.S.C. 504, by establishing procedures for the filing and consideration of applications for awards of fees and other expenses to eligible individuals and entities who are parties to adversary adjudications before FHFA.

(b) This part applies to the award of fees and other expenses in connection with adversary adjudications before FHFA. However, if a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to 28 U.S.C. 2412(d)(3).

§ 1203.2 Definitions.

As used in this part:

Adjudicative officer means the official who presided at the underlying adversary adjudication, without regard to whether the official is designated as a hearing examiner, administrative law judge, administrative judge, or otherwise.

Adversary adjudication means an administrative proceeding conducted by FHFA under 5 U.S.C. 554 in which the position of FHFA or any other agency of the United States is represented by counsel or otherwise, including but not limited to an adjudication conducted under the Safety and Soundness Act, as amended, and any implementing regulations. Any issue as to whether an administrative proceeding is an adversary adjudication for purposes of this part will be an issue for resolution in the proceeding on the application for award.

Affiliate means an individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interests of the party, or any corporation or other entity of which the party directly or indirectly owns or controls a majority of the voting shares or other interest, unless the adjudicative officer determines that it would be unjust and contrary to the purpose of the Equal Access to Justice Act in light of the actual relationship between the affiliated entities to consider them to be affiliates for purposes of this part.

Agency counsel means the attorney or attorneys designated by the General Counsel of FHFA to represent FHFA in an adversary adjudication covered by this part.

Demand of FHFA means the express demand of FHFA that led to the adversary adjudication, but does not include a recitation by FHFA of the maximum statutory penalty when accompanied by an express demand for a lesser amount.

Director means the Director of the Federal Housing Finance Agency.

Fees and other expenses means reasonable attorney or agent fees, the reasonable expenses of expert witnesses, and the reasonable cost of any study, analysis, engineering report, or test, which the agency finds necessary for the preparation of the eligible party's case.

FHFA means the Federal Housing Finance Agency.

Final disposition date means the date on which a decision or order disposing of the merits of the adversary adjudication or any other complete resolution of the adversary adjudication, such as a settlement or voluntary dismissal, becomes final and unappealable, both within the agency and to the courts.

Party means an individual, partnership, corporation, association, or public or private organization that is named or admitted as a party, that is admitted as a party for limited purposes, or that is properly seeking and entitled as of right to be admitted as a party in an adversary adjudication.

Position of FHFA means the position taken by FHFA in the adversary adjudication, including the action or failure to act by FHFA upon which the adversary adjudication was based.

§ 1203.3 Eligible parties.

(a) To be eligible for an award of fees and other expenses under the Equal Access to Justice Act, the applicant must show that it meets all conditions of eligibility set out in this paragraph and has complied with all the requirements in Subpart B of this part. The applicant must also be a party to the adversary adjudication for which it seeks an award.

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(b) To be eligible for an award of fees and other expenses for prevailing parties, a party must be one of the following:

(1) An individual who has a net worth of not more than \$2 million;

(2) The sole owner of an unincorporated business who has a net worth of not more than \$7 million, including both personal and business interest, and not more than 500 employees; however, a party who owns an unincorporated business will be considered to be an “individual” rather than the “sole owner of an unincorporated business” if the issues on which the party prevails are related primarily to personal interests rather than to business interests;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. 501(c)(3), with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act, 12 U.S.C. 1141j(a), with not more than 500 employees;

(5) Any other partnership, corporation, association, unit of local government, or organization that has a net worth of not more than \$7 million and not more than 500 employees; or

(6) For the purposes of an application filed pursuant to 5 U.S.C. 504(a)(4), a small entity as defined in 5 U.S.C. 601.

(c) For purposes of eligibility under this section:

(1) The employees of a party must include all persons who regularly perform services for remuneration for the party, under the party’s direction and control. Part-time employees must be included on a proportional basis.

(2) The net worth and number of employees of the party and its affiliates must be aggregated to determine eligibility.

(3) The net worth and number of employees of a party will be determined as of the date the underlying adversary adjudication was initiated.

(4) A party that participates in an adversary adjudication primarily on behalf of one or more entities that would be ineligible for an award is not itself eligible for an award.

§ 1203.4 Standards for awards.

(a) An eligible party that files an application for award of fees and other expenses in accordance with this part will receive an award of fees and other expenses related to defending against a demand of FHFA if the demand was in excess of the decision in the underlying adversary adjudication and was unreasonable when compared with the decision under the facts and circumstances of the case, unless the party has committed a willful violation of law or otherwise acted in bad faith, or unless special circumstances make an award unjust. The burden of proof that the demand of FHFA was substantially in excess of the decision and is unreasonable when compared with the decision is on the eligible party.

(b) An eligible party that submits an application for award in accordance with this part will receive an award of fees and other expenses incurred in connection with an adversary adjudication in which it prevailed or in a significant and discrete substantive portion of the adversary adjudication in which it prevailed, unless the position of FHFA in the adversary adjudication was substantially justified or special circumstances make an award unjust. FHFA has the burden of proof to show that its position was substantially justified and may do so by showing that its position was reasonable in law and in fact.

§ 1203.5 Allowable fees and expenses.

(a) Awards of fees and other expenses will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents, and expert witnesses, even if the services were made available without charge or at a reduced rate to the party. However, except as provided in §1203.6, an award for the fee of an attorney or agent may not exceed \$125 per hour and an award to compensate an expert witness may not exceed the highest rate at which FHFA pays expert witnesses. However, an award may also include the reasonable expenses of the attorney, agent, or expert witness as a separate item if he or she ordinarily charges clients separately for such expenses.

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(b) In determining the reasonableness of the fee sought for an attorney, agent, or expert witness, the adjudicative officer will consider the following:

(1) If the attorney, agent, or expert witness is in private practice, his or her customary fees for similar services; or, if the attorney, agent, or expert witness is an employee of the eligible party, the fully allocated costs of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent, or expert witness ordinarily performs services;

(3) The time actually spent in the representation of the eligible party;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the adversary adjudication; and

(5) Such other factors as may bear on the value of the services provided.

(c) In determining the reasonable cost of any study, analysis, engineering report, test, project, or similar matter prepared on behalf of a party, the adjudicative officer will consider the prevailing rate for similar services in the community in which the services were performed.

(d) Fees and other expenses incurred before the date on which an adversary adjudication was initiated will be awarded only if the eligible party can demonstrate that they were reasonably incurred in preparation for the adversary adjudication.

§ 1203.6 Rulemaking on maximum rate for fees.

If warranted by an increase in the cost of living or by special circumstances, FHFA may adopt regulations providing for an award of attorney or agent fees at a rate higher than \$125 per hour in adversary adjudications covered by this part. Special circumstances include the limited availability of attorneys or agents who are qualified to handle certain types of adversary adjudications. FHFA will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. 553.

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§ 1203.7 Awards against other agencies.

If another agency of the United States participates in an adversary adjudication before FHFA and takes a position that was not substantially justified, the award or appropriate portion of the award to an eligible party that prevailed over that agency will be made against that agency.

§§ 1203.8–1203.9 [Reserved]

Subpart B—Information Required From Applicants

§ 1203.10 Contents of the application for award.

(a) An application for award of fees and other expenses under either § 1203.4(a) and § 1203.4(b) must:

(1) Identify the applicant and the adversary adjudication for which an award is sought;

(2) State the amount of fees and other expenses for which an award is sought;

(3) Provide the statements and documentation required by paragraph (b) or (c) of this section and § 1203.12 and any additional information required by the adjudicative officer; and

(4) Be signed by the applicant or an authorized officer or attorney of the applicant and contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true and correct.

(b) An application for award under § 1203.4(a) must show that the demand of FHFA was substantially in excess of, and was unreasonable when compared to, the decision in the underlying adversary adjudication under the facts and circumstances of the case. It must also show that the applicant is a small entity as defined in 5 U.S.C. 601.

(c) An application for award under § 1203.4(b) must:

(1) Show that the applicant has prevailed in a significant and discrete substantive portion of the underlying adversary adjudication and identify the position of FHFA in the adversary adjudication that the applicant alleges was not substantially justified;

(2) State the number of employees of the applicant and describe briefly the

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type and purposes of its organization or business (if the applicant is not an individual);

(3) State that the net worth of the applicant does not exceed \$2 million, if the applicant is an individual; or for all other applicants, state that the net worth of the applicant and its affiliates, if any, does not exceed \$7 million; and

(4) Include one of the following:

(i) A detailed exhibit showing the net worth (net worth exhibit) of the applicant and its affiliates, if any, when the underlying adversary adjudication was initiated. The net worth exhibit may be in any form convenient to the applicant as long as the net worth exhibit provides full disclosure of the assets and liabilities of the applicant and its affiliates, if any, and is sufficient to determine whether the applicant qualifies as an eligible party;

(ii) A copy of a ruling by the Internal Revenue Service that shows that the applicant qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. 501(c)(3); or in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the belief that the applicant qualifies under such section; or

(iii) A statement that the applicant is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act, 12 U.S.C. 1141j(a).

§ 1203.11 Confidentiality of net worth exhibit.

Unless otherwise ordered by the Director, or required by law, the statement of net worth will be for the confidential use of the adjudicative officer, the Director, and agency counsel.

§ 1203.12 Documentation for fees and expenses.

(a) The application for award must be accompanied by full and itemized documentation of the fees and other expenses for which an award is sought. The adjudicative officer may require the applicant to provide vouchers, receipts, logs, or other documentation for any fees or expenses claimed.

(b) A separate itemized statement must be submitted for each entity or individual whose services are covered by the application. Each itemized statement must include:

(1) The hours spent by each entity or individual;

(2) A description of the specific services performed and the rates at which each fee has been computed; and

(3) Any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity.

§§ 1203.13–1203.19 [Reserved]

Subpart C—Procedures for Filing and Consideration of the Application for Award

§ 1203.20 Filing and service of the application for award and related papers.

(a) An application for an award of fees and other expenses must be filed no later than 30 days after the final disposition of the underlying adversary adjudication.

(b) An application for award and other papers related to the proceedings on the application for award must be filed and served on all parties in the same manner as papers are filed and served in the underlying adversary adjudication, except as otherwise provided in this part.

(c) The computation of time for filing and service of the application of award and other papers must be computed in the same manner as in the underlying adversary adjudication.

§ 1203.21 Response to the application for award.

(a) Agency counsel must file a response within 30 days after service of an application for award of fees and other expenses except as provided in paragraphs (b) and (c) of this section. In the response, agency counsel must explain any objections to the award requested and identify the facts relied upon to support the objections. If any of the alleged facts are not already in the record of the underlying adversary

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adjudication, agency counsel must include with the response either supporting affidavits or a request for further proceedings under § 1203.25.

(b) If agency counsel and the applicant believe that the issues in the application for award can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement will extend the time for filing a response for an additional 30 days. Upon request by agency counsel and the applicant, the adjudicative officer may grant for good cause further time extensions.

(c) Agency counsel may request that the adjudicative officer extend the time period for filing a response. If agency counsel does not respond or otherwise does not contest or settle the application for award within the 30-day period or the extended time period, the adjudicative officer may make an award of fees and other expenses upon a satisfactory showing of entitlement by the applicant.

§ 1203.22 Reply to the response.

Within 15 days after service of a response, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the underlying adversary adjudication, the applicant must include with the reply either supporting affidavits or a request for further proceedings under § 1203.25.

§ 1203.23 Comments by other parties.

Any party to the underlying adversary adjudication other than the applicant and agency counsel may file comments on an application for award within 30 calendar days after it is served, or on a response within 15 calendar days after it is served. A commenting party may not participate further in proceedings on the application unless the adjudicative officer determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

§ 1203.24 Settlement.

The applicant and agency counsel may agree on a proposed settlement of an award before the final decision on the application for award is made, ei-

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ther in connection with a settlement of the underlying adversary adjudication or after the underlying adversary adjudication has been concluded. If the eligible party and agency counsel agree on a proposed settlement of an award before an application for award has been filed, the application must be filed with the proposed settlement.

§ 1203.25 Further proceedings on the application for award.

(a) On request of either the applicant or agency counsel, on the adjudicative officer's own initiative, or as requested by the Director under § 1203.27, the adjudicative officer may order further proceedings, such as an informal conference, oral argument, additional written submissions, or, as to issues other than substantial justification (such as the applicant's eligibility or substantiation of fees and expenses), pertinent discovery or an evidential hearing. Such further proceedings will be held only when necessary for full and fair resolution of the issues arising from the application for award and will be conducted as promptly as possible. The issue as to whether the position of FHFA in the underlying adversary adjudication was substantially justified will be determined on the basis of the whole administrative record that was made in the underlying adversary adjudication.

(b) A request that the adjudicative officer order further proceedings under this section must specifically identify the information sought on the disputed issues and must explain why the additional proceedings are necessary to resolve the issues.

§ 1203.26 Decision of the adjudicative officer.

(a) The adjudicative officer must make the initial decision on the basis of the written record, except if further proceedings are ordered under § 1203.25.

(b) The adjudicative officer must issue a written initial decision on the application for award within 30 days after completion of proceedings on the application. The initial decision will become the final decision of FHFA after 30 days from the day it was issued, unless review is ordered under § 1203.27.

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(c) In all initial decisions, the adjudicative officer must include findings and conclusions with respect to the applicant's eligibility and an explanation of the reasons for any difference between the amount requested by the applicant and the amount awarded. If the applicant has sought an award against more than one agency, the adjudicative officer must also include findings and conclusions with respect to the allocation of payment of any award made.

(d) In initial decisions on applications filed pursuant to §1203.4(a), the adjudicative officer must include findings and conclusions as to whether FHFA made a demand that was substantially in excess of the decision in the underlying adversary adjudication and that was unreasonable when compared with that decision; and, if at issue, whether the applicant has committed a willful violation of the law or otherwise acted in bad faith, or whether special circumstances would make the award unjust.

(e) In decisions on applications filed pursuant to §1203.4(b), the adjudicative officer must include written findings and conclusions as to whether the applicant is a prevailing party and whether the position of FHFA was substantially justified; and, if at issue, whether the applicant unduly protracted or delayed the underlying adversary adjudication or whether special circumstance make the award unjust.

§ 1203.27 Review by FHFA.

Within 30 days after the adjudicative officer issues an initial decision under §1203.26, either the applicant or agency counsel may request the Director to review the initial decision of the adjudicative officer. The Director may also decide, at his or her discretion, to review the initial decision. If review is ordered, the Director must issue a final decision on the application for award or remand the application for award to the adjudicative officer for further proceedings under §1203.25.

§ 1203.28 Judicial review.

Any party, other than the United States, that is dissatisfied with the final decision on an application for award of fees and expenses under this

part may seek judicial review as provided in 5 U.S.C. 504(c)(2).

§ 1203.29 Payment of award.

To receive payment of an award of fees and other expenses granted under this part, the applicant must submit a copy of the final decision that grants the award and a certification that the applicant will not seek review of the decision in the United States courts to the Director, Federal Housing Finance Agency, 1700 G Street, NW., Washington, DC 20552. FHFA must pay the amount awarded to the applicant within 60 days of receipt of the submission of the copy of the final decision and the certification, unless judicial review of the award has been sought by any party to the proceedings.

PART 1204—PRIVACY ACT IMPLEMENTATION

Sec.

1204.1 Why did FHFA issue this part?

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AUTHORITY: 5 U.S.C. 552a.

SOURCE: 74 FR 33908, July 14, 2009, unless otherwise noted.

§ 1204.1 Why did FHFA issue this part?

FHFA issued this part to:

(a) Implement the Privacy Act of 1974, 5 U.S.C. 552a, as amended (Privacy Act), a Federal law that helps protect private information about individuals that Federal agencies collect or maintain. You should read this part together with the Privacy Act, which provides additional information about records maintained on individuals;

(b) Establish rules that apply to all FHFA maintained systems of records